

1 WILLIAM A. ISAACSON (*Pro Hac Vice*)
2 STACEY K. GRIGSBY (*Pro Hac Vice*)
3 NICHOLAS A. WIDNELL (*Pro Hac Vice*)
4 (wisaacson@bsfllp.com)
5 (sgrigsby@bsfllp.com)
6 (nwidnell@bsfllp.com)
7 BOIES, SCHILLER & FLEXNER LLP
8 1401 New York Avenue, NW, Washington, DC 20005
9 Telephone: (202) 237-2727; Fax: (202) 237-6131

10 RICHARD J. POCKER #3568
11 (rpocker@bsfllp.com)
12 BOIES, SCHILLER & FLEXNER LLP
13 300 South Fourth Street, Suite 800, Las Vegas, NV 89101
14 Telephone: (702) 382-7300; Fax: (702) 382-2755

15 DONALD J. CAMPBELL #1216
16 (dj@campbellandwilliams.com)
17 J. COLBY WILLIAMS #5549
18 (jcw@campbellandwilliams.com)
19 CAMPBELL & WILLIAMS
20 700 South 7th Street, Las Vegas, Nevada 89101
21 Telephone: (702) 382-5222; Fax: (702) 382-0540

22 *Attorneys for Defendant Zuffa, LLC, d/b/a*
23 *Ultimate Fighting Championship and UFC*

24 UNITED STATES DISTRICT COURT

25 DISTRICT OF NEVADA

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Cung Le, Nathan Quarry, Jon Fitch, Brandon
Vera, Luis Javier Vazquez, and Kyle
Kingsbury, on behalf of themselves and all
others similarly situated,

Plaintiffs,

v.

Zuffa, LLC, d/b/a Ultimate Fighting
Championship and UFC,

Defendant.

No.: 2:15-cv-01045-RFB-(PAL)

**ZUFFA, LLC'S MOTION FOR
PARTIAL SUMMARY JUDGMENT AS
TO PLAINTIFF NATHAN QUARRY
ON STATUTE OF LIMITATIONS
GROUNDS AND SUPPORTING
MEMORANDUM OF LAW
(HEARING REQUESTED)**

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Defendant Zuffa, LLC (“Zuffa”) submits this Motion for Partial Summary Judgment As to Plaintiff Nathan Quarry on Statute Of Limitations Grounds And Supporting Memorandum Of Law (“Zuffa Motion”) and seeks judgment in its favor as to all of Plaintiff Quarry’s claims on the grounds that his claims are time-barred. In addition to its Motion, Zuffa submits its Statement of Undisputed Material Facts in Support of the Zuffa Motion (“SUF”) and the Declaration of Kirk D. Hendrick In Support Of Zuffa, LLC’s Motion For Summary Judgment As To Plaintiff Nathan Quarry On Statute Of Limitations Grounds.¹

INTRODUCTION

Plaintiffs allege that Zuffa has monopolized an “output” market for “promoting live, elite, professional MMA [(mixed martial arts)] bouts” by foreclosing other MMA promoters from access to “elite MMA fighters,” “key sponsors,” and “premier venues,” and, in doing so, became a monopsonist in the “input” market for purchasing “live, elite, professional MMA fighter services.” Consolidated Am. Compl. (“CAC”) (ECF No. 208) ¶¶ 55, 76, 107, 116, 122. In short, Plaintiffs’ proposed theory is that Zuffa succeeded because potential rivals could not compete when Zuffa denied them access to the relationships that Zuffa had developed for itself, *i.e.* when rival promoters did not have access to the same fighters, the same venues (for the same time periods), and the same sponsors as Zuffa, those promoters were incapable of competing. In actuality, Zuffa rose to prominence because it created a product and then was a better competitor than its rivals.

Zuffa was formed to purchase the failing Ultimate Fighting Championship® (“UFC”) brand in 2001. *Id.* ¶ 28. At the time of purchase, the future success of UFC was by no means guaranteed, as evidenced by its \$ 2 million price tag. *Id.* Indeed, from 2001 to 2004, Zuffa struggled and lost millions of dollars. Yet, in less than a decade, Zuffa transformed the UFC from a struggling business to a successful MMA promoter through its investments in the UFC and in

¹ Exhibits to Hendrick Declaration are referenced herein as “Zuffa Mot. Ex.”

1 growing the sport of MMA as a whole. Many of Zuffa's business decisions enabled this
2 transformation to occur—Zuffa had to invest in lobbying for rules and regulations at the state
3 level for fair and safe bouts; Zuffa had to attract top athletes by paying them as much or more
4 than other promoters were willing to pay; and Zuffa had to create a better experience for the
5 athletes to compete and the fans to enjoy the competition. Ultimately, these business decisions
6 allowed Zuffa to offer athletes the best promotional opportunities and, as a result, athletes stayed
7 with Zuffa. Plaintiffs' case is flawed in many respects,² but first and foremost, Plaintiffs'
8 allegations run afoul of the well-established principle that antitrust liability cannot arise from
9 "growth or development as a consequence of a superior product, business acumen, or historic
10 accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570 (1966).

12 Although the broader flaws with Plaintiffs' case await full discovery before they can be
13 resolved, one issue does not raise any disputed facts. Mr. Quarry's claim that his "Identity was
14 expropriated and his payments for appearing in UFC Licensed Merchandise and UFC
15 Promotional Materials was artificially suppressed" arises solely out of the express terms of his
16 agreements with Zuffa, all of which were executed outside the applicable four-year statute of
17 limitations period that began to run on December 16, 2010. All the terms to which Plaintiffs
18 object were set before that date. As a result, his December 16, 2014 claim based on the alleged
19 "expropriation" and "exploitation" of his identity rights is time-barred, and none of the
20 recognized exceptions to the statute of limitations excuse Mr. Quarry's failure to bring his claim
21 in a timely fashion.
22
23

24
25
26 ² Although insufficient to overcome "the fairly forgiving standard" on a motion to dismiss, Mot.
27 to Dismiss Hearing Tr. 13:9-13, Sept. 25, 2015, Zuffa has identified a number of issues with
28 Plaintiffs' market definition and the implausible basis for asserting that Zuffa foreclosed
competitors from inputs necessary to compete. *See generally* ECF Nos. 64, 82.

RELEVANT FACTUAL BACKGROUND

Zuffa promotes live professional MMA bouts in the U.S. and elsewhere, under the trade names of the Ultimate Fighting Championship® and UFC®.³ CAC ¶ 30.⁴ As part of this business, Zuffa contracts with athletes to participate in live bouts and to allow Zuffa the right to use their identities — including an athlete’s “name, sobriquet, voice, persona, signature, likeness, and/or biography” — in certain limited ways in connection with UFC promotions. CAC ¶ 27(f); SUF ¶ 2 (quoting Zuffa Mot. Ex. A, Art. 3.1) (collectively, “UFC Identity Rights”). Three categories of agreements govern the use of an athlete’s identity: (1) Promotional and Ancillary Rights Agreements (“Promotional Agreement”), (2) Merchandise Rights Agreements, and (3) Bout Agreements. SUF ¶ 3. Each of these agreements defines the scope of the Identity Rights an athlete will grant and any services the athlete must perform, and specifies the payments Zuffa will make in exchange for those rights. The UFC Identity Rights do not limit [REDACTED]

[REDACTED]

These agreements allow Zuffa to [REDACTED]

[REDACTED] *E.g.*, SUF ¶ 8 (citing Zuffa Mot. Ex. A, Art. 3.1). The agreements also permit Zuffa to [REDACTED]

[REDACTED]. *E.g.*, SUF ¶ 31.

I. Contracts Executed by Mr. Quarry and Zuffa Before the Statute-of-Limitations Period

All the parties agree that Plaintiff Nathan Quarry is an athlete who contracted with Zuffa and competed in the UFC and received contractual payments in exchange for services to be performed and the use of his UFC Identity Rights. CAC ¶ 34; SUF ¶¶ 15-16, 29-30, 32. It is also undisputed that Mr. Quarry’s Promotional Agreement, Merchandise Rights Agreements, and Bout Agreements pre-date the first complaint filed in this action by more than four years. SUF ¶ 51.

³ As a defined term in Zuffa’s agreements, a “Bout” is a “[REDACTED]”. *E.g.*, SUF ¶ 16 (quoting Zuffa Mot. Ex. A, at LEPLAINTIFFS-0048763).

⁴ For purposes of this motion for summary judgment only, Zuffa accepts in a light most favorable to Plaintiffs certain factual allegations in the Consolidated Amended Complaint.

A. Mr. Quarry's Promotional Agreements

Mr. Quarry's first agreement with Zuffa, a Promotional and Ancillary Rights Agreement, took effect on October 5, 2004 ("2004 Promotional Agreement"). SUF ¶ 5 (citing Zuffa Mot. Ex. D); *see* CAC ¶ 27(e) (defining "Exclusive Promotional and Ancillary Rights Agreement").⁵ The 2004 Promotional Agreement provides Zuffa the right to use Mr. Quarry's Identity "[REDACTED]" *E.g.*, SUF ¶ 8 (quoting Zuffa Mot. Ex. A, Art. 3.1).

Among other terms, a provision for the "Grant of Ancillary Rights/Collective Rights," (hereinafter, "Grant of Ancillary Rights") in the 2004 Promotional Agreement defined the scope of Identity Rights that Mr. Quarry granted to Zuffa. The Grant of Ancillary Rights in the 2004 Promotional Agreement allowed Zuffa to have the "[REDACTED]" SUF ¶ 9 (quoting Zuffa Mot. Ex. D) at Art. 5.1; *see* CAC ¶ 27(q) (defining "Promotional Rights and Ancillary Rights"); CAC ¶ 27(t) (defining "UFC Licensed Merchandise"), ¶ 27(u) (defining "UFC Promotional Materials"). The Grant of Ancillary Rights also provided that Zuffa could use Mr. Quarry's UFC Identity Rights "[REDACTED]" SUF ¶ 11 (quoting Zuffa Mot. Ex. D, Art. 5.2, 5.4, 13.3 ([REDACTED])); CAC ¶ 27(q), ¶ 113(d) (alleging the "Ancillary Rights Clause remains in effect in perpetuity," including after the term of the contract). Finally, Article IX of the 2004 Promotional Agreement sets forth the total payments

⁵ The terms of the 2004 Promotional Agreement became effective upon [REDACTED], which Zuffa exercised on February 25, 2005. SUF ¶ 7.

1 Zuffa would make to Mr. Quarry for the services to be performed as well as all rights granted
2 under the agreement. SUF ¶ 12 (citing Zuffa Mot. Ex. D, Art. 9.3).

3 On November 14, 2005, Zuffa and Mr. Quarry executed a new and superseding
4 Promotional Agreement (“2005 Promotional Agreement”), which contained a Grant of Ancillary
5 Rights identical to the 2004 Promotional Agreement. SUF ¶ 13. In addition to providing for the
6 scope and duration of the grant of Mr. Quarry’s Identity Rights, Article VII of the 2005
7 Promotional Agreement also sets forth the total payments Zuffa would make to Mr. Quarry for
8 the services to be performed and the rights granted under the 2005 agreement. SUF ¶¶ 13-14
9 (“
10
11
12 (quoting Zuffa Mot. Ex. F, Art. 7.3, at ZFL-
0003093).

13 On October 13, 2008, a new and superseding Promotional Agreement between Zuffa and
14 Mr. Quarry took effect (“2008 Promotional Agreement”). SUF ¶ 15. Article III of the 2008
15 Promotional Agreement was almost identical to the Grant of Ancillary Rights in the 2004 and
16 2005 Promotional Agreements, except it allowed Zuffa to use Mr. Quarry’s Identity: (1)
17
18
19 ” SUF ¶ 18
20 (quoting Zuffa Mot. Ex. A, Art. 3.4(h), 3.4(i)). As with both the 2004 and 2005 agreements,
21 Article VII of the 2008 Promotional Agreement set forth in express terms the total payments
22 Zuffa would make to Mr. Quarry in exchange for the services to be performed and the rights
23 granted under the agreement. SUF ¶¶ 14, 16, 19.

24 **B. Mr. Quarry’s Bout Agreements**

25 For each UFC bout in which Mr. Quarry participated, the Promotional Agreements
26 provided that the parties would “
27 SUF ¶ 20 (quoting Zuffa Mot. Ex. A, Art. VI); see CAC ¶ 27(a) (defining “Bout Agreement”). In
28 addition to such details as the date, location, weight class, and payments for the specified bout,

the Bout Agreement also included ancillary rights (“Bout Ancillary Rights”) correlated to the Grant of Ancillary Rights in the Promotional Agreement. *E.g.*, SUF ¶ 21 (Zuffa Mot. Ex. C, at ZFL-0390586 (defining “Bout Ancillary Rights”)) and SUF ¶ 25 (enumerating “Bout Ancillary Rights”). The Bout Ancillary Rights include the rights to (a) [REDACTED]

[REDACTED] *Id.* ¶ 22.

Mr. Quarry’s last Bout Agreement with Zuffa took effect on January 13, 2010 (“2010 Bout Agreement”) in advance of a March 31, 2010 bout. *Id.* ¶ 23. Among other terms, the 2010 Bout Agreement contained a grant of Bout Ancillary Rights for the March 31, 2010 bout. *Id.* ¶ 25 (citing Zuffa Mot. Ex. C, at ZFL-0390586 and ZFL-0390592). The 2010 Bout Agreement also specified the total payments Zuffa would make to Mr. Quarry for the services to be performed and the grant of rights under the Agreement. *Id.* ¶ 26 (citing Zuffa Mot. Ex. C, at ZFL-0390586).

On March 31, 2010, Mr. Quarry fought his last bout promoted by the UFC. CAC ¶ 34. The January 13, 2010 Bout Agreement is the most recent agreement of any kind between Mr. Quarry and Zuffa related to his Identity Rights. SUF ¶ 28.

C. Mr. Quarry’s Merchandise Rights Agreements

In 2008, Mr. Quarry and Zuffa executed a Merchandise Rights Agreement (“Merchandise Rights Agreement”), which took effect on October 13, 2008. SUF ¶ 30 (citing Zuffa Mot., Ex. B); *see* CAC ¶ 27(i) (defining “Merchandise Rights Agreement”). In that Agreement, Mr. Quarry granted Zuffa and its affiliates certain rights to use his identity in “Licensed Merchandise” in exchange for royalty payments fixed by the contract. SUF ¶ 31 (quoting Zuffa Mot. Ex. B, Art. I & Art. III); *see* CAC ¶ 27(h) (defining “Merchandise Rights”); ¶ 27(i) (defining “Merchandise Rights Agreement”). “Licensed Merchandise” includes [REDACTED]

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED] CAC ¶ 27(t); SUF ¶ 34 (quoting Zuffa Mot. Ex. B, Art. 1.3). The Merchandise
 5 Rights Agreement only addresses the use of an athlete's Identity in connection with merchandise
 6 containing the UFC's intellectual property. CAC ¶ 27(t); SUF ¶ 35 (citing Zuffa Mot. Ex. B, Art.
 7 1.3 (defining "Licensed Merchandise)); CAC ¶ 27(t) (defining "UFC Licensed Merchandise").
 8 The Merchandise Rights Agreement expressly sets forth the royalty rates that Zuffa will pay Mr.
 9 Quarry [REDACTED] SUF ¶ 36
 10 (quoting Zuffa Mot. Ex. B, Art. 3.1(a)- (b)). The term of the 2008 Merchandise Rights
 11 Agreements is [REDACTED]
 12 [REDACTED] SUF ¶ 38 (quoting Zuffa Mot. Ex. B, Art. 2.1-2.2).

13 **D. Mr. Quarry Understood the Obligations Under These Agreements**

14 It is undisputed that the provisions in the contracts form the basis for Mr. Quarry's claims
 15 and that Mr. Quarry understood that the alleged harm he has claimed to suffer arose from his
 16 agreement to the terms in the contract. SUF ¶¶ 49-51.

17 "Q: Okay. And while I understand you are not -- you are neither a lawyer, nor
 18 perhaps someone who understands all the legal terminology, when you're talking
 19 about the contracts that took your identity, are you referring to these promotional
 20 and ancillary rights agreements that you entered into with Zuffa?

21 ...

22 THE WITNESS: I believe this was the start of such things, and there were further
 23 contracts to come."

24 Zuffa Mot., Ex. G, Quarry Dep. 118:17-21, 118:23-119:6, 119:9-18, 119:21. It is also
 25 undisputed that Mr. Quarry became aware of the effect of these agreements at least
 26 sometime before his last bout in March of 2010. *Id.* at 120:11-19, 121:25-122:12; SUF
 27 ¶¶ 50-51. In fact, Mr. Quarry recalls speaking to others about his concerns before his last
 28 bout:

"Q And when I say that, at the time you would begin to speak out about your
 concern that your likeness rights were being used by the UFC, that's something

1 you might say to other fighters or if asked by the MMA media?

2 . . .

3 THE WITNESS: Well, specifically speaking about the UFC video game and
4 talking to Joe Silva was that my likeness is being used in this video game. I am
5 not being compensated whatsoever. So that is definitely a pinpoint in time where I
6 was very unhappy about my likeness and other fighters' likenesses being used
7 without any payments or the ability to negotiate for payments.”

8 Zuffa Mot., Ex. G, Quarry Dep.122:19-23, 123:1-8, 123:10-15; SUF ¶ 51.

9 **II. Mr. Quarry’s Allegations Against Zuffa**

10 On December 16, 2014, more than four years after Mr. Quarry executed his last agreement
11 with Zuffa, Mr. Quarry filed his Complaint. SUF ¶¶ 48, 52; ECF No. 1. Mr. Quarry alleges only:
12 (1) that he “appeared in the UFC Undisputed 2010 video game that debuted on May 25, 2010, in
13 North America, and is still sold today,” (2) that he “has also been featured in a number of trading
14 cards manufactured and sold by Topps Trading Cards, including a series in 2010, which are still
15 sold today,” CAC ¶ 34, and (3) that Zuffa has exploited and continues to exploit Mr. Quarry’s
16 identity pursuant to the terms of his operative agreements during the “Class Period,” i.e., since
17 December 16, 2010. CAC ¶ 3. Plaintiffs never allege that Mr. Quarry entered any agreement
18 after December 16, 2010 that affected the scope or duration of his grants of Identity Rights to
19 Zuffa or the payments Zuffa would pay Mr. Quarry for appearing in what Plaintiffs define as
20 “UFC Licensed Merchandise” and “UFC Promotional Materials.” CAC ¶¶ 27(t), 27(u), 34.

21 **LEGAL STANDARD**

22 “The court shall grant summary judgment if the movant shows that there is no genuine
23 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.
24 Civ. P. 56(a). “[T]here is no issue for trial unless there is sufficient evidence favoring the
25 nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable,
26 or is not significantly probative, summary judgment may be granted.” *Anderson v. Liberty*
27 *Lobby, Inc.*, 477 U.S. 242, 249-50 (1986) (internal citations omitted). “In making such a
28 determination, the Court must view the facts and inferences to be drawn therefrom in the light
most favorable to the nonmoving party, and may consider extrinsic materials so long as they

would be admissible in evidence.” *Joseph v. Amazon.com, Inc.*, 46 F. Supp. 3d 1095, 1100 (W.D. Wash. 2014) (citing *Anderson*, 477 U.S. at 247–50; Fed. R. Civ. P. 56(c)).

The moving party bears the initial burden of informing the court of the basis for the summary judgment motion. Fed. R. Civ. P. 56(c); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). “Once the moving party meets its initial burden, . . . the burden shifts to the non-moving party to set forth, by affidavit or as otherwise provided in Rule 56, specific facts showing that there is a genuine issue for trial.” *FTC v. Stefanchik*, 559 F.3d 924, 927-28 (9th Cir. 2009) (quoting *Celotex*, 477 U.S. at 323) (internal quotation marks and citation omitted). Conclusory or speculative testimony is insufficient to raise a genuine issue of fact to defeat summary judgment. *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 69 F.3d 337, 345 (9th Cir. 1995).

ARGUMENT

I. Mr. Quarry’s Antitrust Claim Is Barred by the Four-Year Statute of Limitations

Mr. Quarry’s antitrust claim is time-barred because the terms he attacks in his agreements—the grants of Identity Rights to Zuffa and the payments he received—were fixed outside the four-year limitations period. Private antitrust claims are subject to a four-year statute of limitations that begins “to run when a defendant commits an act that injures a plaintiff’s business.” *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971) (citing 15 U.S.C. § 15) (emphasis added). As soon as a potential plaintiff is harmed, “a cause of action immediately accrues to him to recover all damages incurred by that date and all provable damages that will flow in the future from” those acts. *Id.* at 339. It necessarily follows that where an antitrust claim challenges an allegedly anticompetitive contract that causes immediate injury, a plaintiff must file suit within four years after executing that contract. See *Eichman v. Fotomat Corp.*, 880 F.2d 149, 160 (9th Cir. 1989) (statute of limitations barred antitrust claim when lease contract containing allegedly anticompetitive provisions was entered into outside the limitations period); *Aurora Enterprises, Inc. v. National Broadcasting Co.*, 688 F.2d 689, 693 (9th Cir. 1982) (statute of limitations barred plaintiff’s claim where contract containing allegedly anticompetitive provision executed more than four years before complaint was filed).

Distilled to its essence, Mr. Quarry’s claim challenges the scope of the UFC Identity

1 Rights he contractually granted to Zuffa, the duration of those grants, and the payments he
 2 received in return—all terms in his 2004, 2005, and 2008 Promotional Agreements; his 2008
 3 Merchandise Rights Agreement; and his January 2010 Bout Agreement. Specifically, Mr. Quarry
 4 challenges the scope and duration in the Ancillary Rights Clauses in his agreements with Zuffa,
 5 *i.e.*, the Grant of Ancillary Rights, the Bout Ancillary Rights, and the Grant of Merchandise
 6 Rights. Mr. Quarry argues that these clauses have led to the “expropriation” and “exploitation”
 7 of his Identity by “grant[ing] the UFC exclusive and perpetual worldwide personality and Identity
 8 rights not only of the UFC Fighter, but of ‘all persons associated with’ the athlete, in any
 9 medium, including merchandising, video games and broadcasts, and for all other commercial
 10 purposes.” CAC ¶¶ 34, 113(d). Yet, all of the terms that allegedly “expropriated” Mr. Quarry’s
 11 Identity appeared in his pre-limitations period agreements with Zuffa.

12 The 2008 Promotional Agreement fixed the scope, duration, and payments that
 13 Mr. Quarry agreed to receive in exchange for participation in UFC bouts and for the use of his
 14 Identity Rights. SUF ¶¶ 16, 18. Mr. Quarry claims that he suffered injury because the perpetual
 15 duration of the Ancillary Rights Clauses of the Promotion Agreement prevent him and other
 16 fighters “from financially benefiting from the reputations that they built during their MMA
 17 careers even after death, and lock[s] UFC Fighters out of revenues generated by the exploitation
 18 of their Identities, including after the term of the contract.” CAC ¶¶ 34, 113(d). Mr. Quarry’s
 19 claims mischaracterize the terms of his agreement, but regardless, the agreements at issue lie
 20 outside the limitations period.

21 The Bout Agreements, which incorporate by reference the Grant of Ancillary Rights from
 22 the Promotional Agreements, are equally clear about the scope, duration, and payments to be
 23 made for Mr. Quarry’s grant of Identity Rights contained therein. *See, e.g.*, SUF ¶ 26 (citing
 24 Zuffa Mot. Ex. C, at ZFL-0390586 ([REDACTED])
 25 [REDACTED]
 26 [REDACTED]). The
 27 same is true of Mr. Quarry’s claims as they relate to the use of his Identity in “UFC Licensed
 28

at 23.⁶ This argument fails because Mr. Quarry cannot revive a time-barred claim based on allegations that, during the Class Period, Zuffa received benefits under pre-limitations period agreements. As the Ninth Circuit has recognized, to rule in Mr. Quarry’s favor would effectively render the statute of limitations meaningless in all instances where plaintiffs argue that defendants’ alleged conduct depressed the value of a contract related to intellectual property. *Aurora Enter.*, 688 F.2d at 694 (“Any other holding would destroy the function of the statute, since parties may continue indefinitely to receive some benefit as a result of an illegal act performed in the distant past.”).

“A continuing violation is one in which the plaintiff’s interests are repeatedly invaded and a cause of action arises each time the plaintiff is injured.” *Pace Indus., Inc. v. Three Phoenix Co.*, 813 F.2d 234, 237 (9th Cir. 1987). “However, even when a plaintiff alleges a continuing violation, an overt act by the defendant is required to restart the statute of limitations and the statute runs from the last overt act.” *Id.* To generate a new antitrust claim for limitations purposes, an “overt act” must meet two conditions: First, it must be a “new and independent act that is not merely a reaffirmation of a previous act” and second, it must “inflict new and accumulating injury on the plaintiff.” *Id.* at 237. “[N]ot every act by an antitrust defendant is sufficient to restart the statute of limitations.” *Aurora Enters*, 688 F.2d at 694; *accord Varner v. Peterson Farms*, 371 F.3d 1011, 1020 (8th Cir. 2004) (“Performance of the alleged anticompetitive contracts during the limitations period is not sufficient to restart the period”).

The Ninth Circuit has held that a defendant’s continued receipt of benefits from pre-limitations period agreements does not trigger the continuing violation exception—squarely

⁶ Mr. Quarry could also argue that the statute of limitations is tolled by “active enforcement” by Zuffa. *See, e.g., Eichman*, 880 F.2d at 160 (citing *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264 (9th Cir. 1975)). Mr. Quarry has failed to make such an allegation in his complaint and Zuffa is aware of no action it has taken that would qualify as active enforcement as that term has been defined in *Eichman*. *Id.* (noting active enforcement in *Finley* applied when the litigation originated from “an action by the antitrust cross-defendant to enforce the contract” and “the plaintiff actively attempted to avoid being bound by the contract.”) Specifically, this matter does not arise in the context of Zuffa seeking to enforce its contractual rights and there are no allegations that Mr. Quarry attempted to avoid being bound by the contractual provisions during the statute-of-limitations period.

1 rejecting the argument that Plaintiffs rely upon. *Aurora Enters.*, 688 F.2d at 694. For example, in
 2 *Aurora*, the Ninth Circuit expressly rejected an antitrust plaintiff's argument that the continued
 3 receipt of benefits from a contract constituted an overt act sufficient to restart the statute of
 4 limitations. *Id.* "[T]he mere fact that defendants receive a benefit today as a result of a contract
 5 executed in 1966 in which Xanadu was purportedly coerced to part with syndication rights, is not
 6 enough to restart the statute of limitations." *Id.* at 694.

7 Mr. Quarry's argument for applying the continuing violation exception in this case is
 8 indistinguishable from the one the Ninth Circuit rejected in *Aurora*. Mr. Quarry cannot dispute
 9 that all of the agreements granting his Identity Rights to Zuffa were executed outside the
 10 limitations period. As the plaintiff argued unsuccessfully in *Aurora*, Mr. Quarry claims that Zuffa
 11 "deprived [him] of revenues that [he] would have earned had [he] not been forced to part with
 12 [his Identity] rights." 688 F.2d at 693. But, just as NBC's right to benefit from Chapparral's
 13 syndication rights was set in pre-limitations period agreements, Zuffa's use of Mr. Quarry's
 14 Identity under the terms and at the payments levels was set in the 2008 Promotional Agreement,
 15 2008 Merchandise Rights Agreement, and pre-limitations period Bout Agreements. That Mr.
 16 Quarry has not received revenues from the exploitation of his Identity during the limitations
 17 period is not a new injury, "but unabated inertial consequences of some pre-limitations action"
 18 and cannot serve as the basis for his claims for damages. *In re Multidistrict Vehicle Air Pollution*,
 19 591 F.2d 68, 72 (9th Cir. 1979) (quoting *Poster Exch., Inc. v. Nat'l Screen Serv. Corp.*, 517 F.2d
 20 117, 128 (5th Cir. 1975), cert. denied, 423 U.S. 1054 (1976)); see *Witt Co. v. RISO, Inc.*, 948 F.
 21 Supp. 2d 1227, 1236 (D. Or. 2013) ("any sales of digital duplicators and supplies pursuant to
 22 paragraph 3(a) of the 2007 Dealer Agreement and occurring during the limitations period do not
 23 amount to continuing violations because performance of an alleged illegal contractual tie-in
 24 provision does not satisfy the continuing violation requirements"); *MedioStream, Inc. v.*
 25 *Microsoft Corp.*, 869 F. Supp. 2d 1095, 1106 (N.D. Cal. 2012) ("mere fulfillment of the terms of
 26 a permanent agreement executed outside the limitations period" does not trigger the continuing
 27 violation exception) (internal quotation marks omitted).

1 Because application of the continuing violation exception to Mr. Quarry's claim
2 contradicts binding Ninth Circuit law, this Court should reject Plaintiffs' invitation to do
3 so.

4 **CONCLUSION**

5 For the reasons set forth above, Defendant Zuffa respectfully submits that summary
6 judgment should be entered against Mr. Quarry and all similarly situated members of the putative
7 Identity Class because their claims are untimely under the governing four-year statute of
8 limitations.

9
10 Dated: February 1, 2017

Respectfully Submitted,

11 BOIES, SCHILLER & FLEXNER LLP

12
13 By: /s/ Nicholas A. Widnell

14 Nicholas A. Widnell

15 *Attorneys for Defendant Zuffa, LLC, d/b/a*
16 *Ultimate Fighting Championship and UFC*
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that service of the foregoing **Defendant Zuffa, LLC's Motion for Partial Summary Judgment As to Plaintiff Nathan Quarry on Statute Of Limitations Grounds And Supporting Memorandum Of Law** was served on February 1, 2017 via the Court's CM/ECF electronic filing system addressed to all parties on the e-service list.

/s/ Michael Kim

An employee of Boies, Schiller & Flexner, LLP